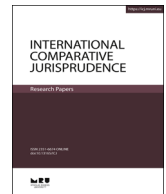


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Available Defences in Provisional measures: Between the Enforcement Directive and National law ☆, ☆ ☆



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ABSTRACT

The EU Enforcement Directive provides a set of provisional measures to be applied upon request from a right-holder of a particular object of intellectual property. Simultaneously, the EU Enforcement Directive envisages a set of defences for an alleged infringer (defendant) in order to safeguard the balance of the parties. This article discusses available defences for an alleged infringer in the provisional measures as provided by the EU Member States when the norms of the EU Enforcement Directive are transposed. Specifically, the present article not only focuses on the threshold of evidence to be presented by a plaintiff for the application of provisional measures, but also in regard to a set of available motions that could be lodged by an alleged infringer. This article argues that though the EU Enforcement Directive should provide harmonisation of national law in relation to provisional measures (in addition to other civil remedies under that Directive), the currently existing disparities among EU Member States demonstrate that such an aim is far from being achieved. Therefore, application of provisional measures throughout EU depends on the national law and, in the result, its practical outcome varies from one EU Member State to another.

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1. Introduction

1.1. Topicality of the subject

Intellectual property (hereinafter IP) is usually reviewed from the point of view of right holders of the IP objects. Such an approach, which requires an ever increasing scope of IP protection is completely obvious, as the protection of IP rights is designed and developed for protection of the IP right holders, on the one hand, and the protection of other legal interests, like the interests of consumers, on the other hand. However, there is another tendency that has taken up an ever increasing role in the modern times, when the usual image of an IP infringer is changing. If a potential infringer was previously

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described as a wilful criminal or a shameful imitator¹, then in modern times it is clear that even large corporations, including software corporations, may become potential infringers of IP objects. Consequently, it is no longer appropriate to review IP protection only from the point of view of IP right holders and the protection of their interests.

In order to ensure the possibility of execution of a court ruling, there is necessity for effective provisional measures which could be applicable during the time period when court proceedings take place until a final court's ruling enters into force. As stated by Professor Annette Kur in this regard, 'there is no doubt that interlocutory injunctions are of central importance in intellectual property infringement proceedings' (Kur, 2004, p. 825). These provisional measures are specific procedural instruments to be applied to civil proceedings² for the temporary suspension of activities of an alleged infringer during ongoing court proceedings or before the commencement of court proceedings.

Yet, the existence of defences available for defendants in IP infringement cases³ against the application of provisional measures is of outstanding importance to ensure the justice, equality of parties and balance of the rights of both parties, i.e., a plaintiff (a particular IP right holder) and a defendant (an alleged infringer).

This article reviews provisional and precautionary measures (hereinafter provisional measures⁴) as regulated at the EU level by the Enforcement Directive (2004) (could be also referred to as interlocutory injunctions (Kur, 2004, p. 825; European Commission, 2010), simply as injunctions (Kur and Dreier, 2013, p. 445), interim injunctions (Bainbridge, 2012, p. 926), or cease and desist letters (Fei, 2014, p. 631), depending on the author or jurisdiction) from the point of view of alleged IP infringers (defendants in IP infringement cases). The topicality of this issue not only arises from the point of view of ensuring the balance of parties in civil procedure, but also from the fact that provisional measures under the Enforcement Directive are little discussed, as the main attention is related to other remedies like damages (Johnson, 2013). This article demonstrates that despite the aim of the EU Enforcement Directive to harmonise national law in relation to provisional measures (and other civil remedies), the currently existing disparities among EU Member States demonstrate that such an aim is far from being achieved.

1.2. Scope and structure of the article

The aim of this article is to study the available defences for defendants within the application of provisional measures as provided by the Enforcement Directive (the EU level) and transposed into the national laws of the EU Member states to be applied in the court practice (the national level). However, the aim of this article is not to challenge the effectiveness of the appropriate national provisional measures of the EU Member States, rather it is to explore the level of the harmonisation of those measures from the perspective of the Enforcement Directive.

In conducting this study, the article is divided into three parts. It begins with a brief review of the provisional measures provided by the Enforcement Directive; then it carries on with its transposition into laws of the EU Member states (the legislative approach); and finally, it discusses whether the availability of defences envisaged by the Enforcement Directive within the application of provisional measures is ensured in the national laws of the EU Member states (the practical approach).

While admitting that the Enforcement Directive is the main source for the regulation of provisional measures, there are still also other legal acts in the EU law providing specific provisional measures. First, as explicitly mentioned in the Enforcement Directive itself (Art. 9 (1) (a) of the Enforcement Directive supported by Points 16 and 23 of its preamble in conjunction with Art. 2 (2)), it does not apply to intermediaries liable for copyright infringements which are covered by the Information Society Directive (2001), specifically, Arts. 2–6 and 8 of the Information Society Directive. Second, it is without prejudice to those provisional measures contained not only in the above mentioned provisions of the Information Society Directive, but also in Art. 7 of the Computer Programs Directive (1991). Still, these additional provisional measures will not be discussed in this article if their scope goes beyond the scope of provisional measures as provided by the Enforcement Directive. In addition and due to the scope of this article, the extent of the provisional measures contained in Art. 50 of TRIPS and its compliance with national laws of EU Member states (simultaneously being Member states of the World Trade Organisation together with the EU itself) will not be reviewed. Another reason for such limitation of the scope lies in the fact that the TRIPS was implemented in the EU law by the very adoption of the Enforcement Directive (Ubertazzi, 2009, p. 927; European Commission, 2010b) itself, including the implementation of Art. 50 of the TRIPS, which specifically provides provisional measures.

¹ One of such notable examples is the critical comment on the EU institutions' legislative initiative which is particularly covered by this article by stating that '[m]ost people abhor deliberate imitators of protected products, who can offer no justification for what they are doing, who have no intention of taking any licence and who are out for whatever profit they can get' (Cornish et al, 2003, p. 447).

² It shall be mentioned that provisional measures of similar nature may be applicable within criminal proceedings and also administrative proceedings. Yet, this article focuses on civil proceedings and consequently it does not review provisional measures in criminal or administrative procedures. Similarly, the Enforcement Directive discussed within this article has a similar scope of regulation (see Art. 2 (3) (b) and (c) of the Enforcement Directive (2004)). Yet, due to the scope of this article it would be sufficient in this regard, to mention that the proposal for Directive governing criminal measures for intellectual property infringements was withdrawn by the European Commission (2010a).

³ As the provisional measures are specifically aimed to be applied within the infringement proceedings, they may not be applied within invalidation proceedings. Therefore (European Commission, 2005), in the case of provisional measures, the IP infringement cases are relevant.

⁴ Within this article, provisional measures are understood as the procedural measures which are imposed by a court in IP infringement cases within civil proceedings which are not final and are in force until revoked or until the final court ruling enters into force.

1.3. Methodology

The research is based on the methodology of legal science by applying different legal methods, including the analytical method and the comparative method. The study reflected in this article is based on different type of sources: the EU legal acts and normative acts of the EU Member states, including legislative documents, legal commentaries (monographs, articles, etc.), and the available court practice of the EU Member states. It should be noted that this article does not cover all 28 EU Member States; however, it analyses a sufficient number of EU Member States with different legal traditions to arrive at truthful and reliable conclusions.

As to the materials used for the review of the transposition of the Enforcement Directive by the EU Member states, the main source is a report on the national provisions communicated by the EU Member States in regard to the transposition of the Enforcement Directive ([National Provisions Communicated by the Member States Concerning Directive 2004/48/EC](#)). In addition, the country reports prepared by academic commentators ([Walter and von Lewinski, 2010](#))⁵ and the recent national reports on the provisional measures prepared by the relevant AIPPI national committees ([AIPPI, 2012](#)) are also taken into account, especially considering the tendencies and practical implications for the application of national provisions in the court practice within the EU Member states.

2. The Enforcement Directive

2.1. Brief overview

The Enforcement Directive provides the measures and remedies necessary to ensure the enforcement of intellectual property rights⁶ being, as indicated in the legal literature, the only real horizontal directive in the EU IP law ([Handig, 2009](#)). As “the IP-centred” Directive ([Trimble, 2014](#)), it covers any infringement of any IP right as stated by the Enforcement Directive itself⁷, the European Commission and the academic commentators ([Rosler, 2006, p. 775](#); [European Commission, 2010b](#))⁸, yet the concept of the intellectual property infringements covered raises disputes ([European Commission, 2010b](#)). Although it was through the adoption of this Directive concerning procedural remedies that the respective competence was transferred to the EU level ([Jaeger, 2012, p. 297](#)), it would be incorrect to state that the Enforcement Directive provides procedural remedies ([Jaeger, 2012, p. 297](#)), as this is only one particular field covered by the Enforcement Directive in addition to the fields of material law such as damages and their calculation. And while the Enforcement Directive only partly harmonises sanctions with regard to IP rights enforcement ([Glockner, 2012, p. 50](#)), its aim was to at least harmonise those measures which were regulated by this Directive.

As specifically stated in the Proposal for the Enforcement Directive, ‘the legal situation in the Community shows major disparities which do not allow the holders of intellectual property rights to benefit from an equivalent level of protection throughout the Community’ ([European Commission, 2003](#)). Specifically, in the case of provisional measures, the Proposal for the Enforcement Directive admitted that ‘there are major differences in the rules of the procedure and the frequency with which these remedies are used, although these differences are essentially the result of the traditions and approaches adopted by the courts’ ([European Commission, 2003](#)).

However, though the basis for adoption of the Enforcement Directive was to provide uniform regulation as ‘[t]he disparities between the national systems of penalties, apart from hampering the proper functioning of the Internal Market, make it difficult to combat counterfeiting and piracy effectively’ ([European Commission, 2003](#)), the discussion in the further text of this article shows that the situation has not changed significantly, at least in regard to provisional measures. As this was correctly pointed out, the Enforcement Directive ‘indeed is notable as a rare example of Community law affecting matters of national legal procedure’ ([Cook, 2010, p. 733](#)) and by trying to legislate in such an area, the Enforcement Directive has not reached its aims, at least in relation to provisional measures. The reason for such an unsuccessful situation is obvious: the procedural laws are national in their essence. As stated in the academic literature, ‘[i]n procedural law lie the real tests of how punitive, and, therefore, preventive, legal redress should be. The tests have evolved in different countries out of long experience with their own system, each with its virtues and idiosyncrasies’ ([Cornish et al, 2003, p. 448](#)). Therefore, it should be arbitrable to state that the Enforcement Directive ‘has had a positive and significant impact on the protection of intellectual property rights under civil law in Europe’ ([Cojanu, 2015, p. 61](#)).

It should be noted that if before the adoption of the Enforcement Directive, had all 15 EU Member states at that moment envisaged the possibility to call for provisional measures of various kinds ([Kur, 2004, p. 825](#)), the situation after the adoption of the Enforcement Directive from the point of view of the EU law would have been completely different. Before the entry into force of the Enforcement Directive, the provision of provisional measures was the competence of the EU Member states,

⁵ Though these national reports were only prepared in relation to copyright, they are still a useful source for the EU Member states’ approaches to the transposition of the Enforcement Directive and national practices in the application of provisional measures.

⁶ For a brief overview of the Enforcement Directive, see [Bainbridge \(2012, p. 920–929\)](#); [Kur and Dreier \(2013, p. 440–448\)](#).

⁷ In accordance with Art. 2 (1) of the Enforcement Directive, the measures, procedures and remedies provided for by this Directive shall apply to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.

⁸ For a different opinion, see Trevor [Cook \(2010, p. 733\)](#).

while afterwards it became the competence of the EU with the related consequences, like the facilitation of common approaches by exploiting such provisional measures. It is interesting that the Enforcement Directive was adopted shortly before the enlargement of the EU, by pointing out in the legal literature that it was done 'in part to avoid a new round of negotiations with the ten States that became members of the Union on 1 May 2004' (Rosler, 2006, p. 775).

Section 4 of the Enforcement Directive containing Art. 9 provides for provisional and precautionary measures as they are defined by the Enforcement Directive itself as stated above. Three types of such measures can be distinguished there, which will be briefly discussed in the next sub-paragraphs of this article⁹. Although there are distinguished interlocutory injunctions and seizures among these provisional measures (Bonadio, 2008, p. 322), they will all be briefly discussed.

2.2. Available defences under Article 9 of the Enforcement Directive

In the case of the three types of provisional measures provided by Article 9 of the Enforcement Directive¹⁰, certain requirements are established for their application and further enforcement until the final court ruling is adopted. Such requirements are undoubtedly of essential character in ensuring justice and are particularly essential in ensuring the balance of the parties, as the provisional measures may create severe consequences for an alleged infringer as described above. These requirements form a set of defences available for an alleged defendant in challenging the application of the provisional measures as decided by the court (after hearing both parties) or in challenging the revocation of provisional measures which have already been applied and executed, which could take place in cases 'where any delay would cause irreparable harm to the right holder' (Art. 9 (4) of the Enforcement Directive).

2.2.1. Evidence threshold

The first and most straightforward defence relates to the evidence which shall be presented by the claimant when the application of provisional measures is requested.

First, it is evidence of ownership of a particular IP object by a claimant as envisaged by Art. 9 (3) of the Enforcement Directive. Though this provision of the Enforcement Directive provides rather misleading wording stating that such evidence shall be 'with a sufficient degree of certainty that the applicant is the right holder', it is clear that such evidence must prove that the respective claimant must show that it is either the right holder of the particular allegedly infringed IP object, or it is a person entitled to raise a claim for the protection of this object, where mainly, such persons would be licentiatees. For instance, it is a common situation in trade mark infringement cases when a licentiate raises a claim with the consent of the right holder.

The raising of such a claim by the licentiate usually takes place in its own name, rather than in the name of a particular IP right holder which, in some EU Member states, are governed explicitly by the statutes. For instance, statutes in the United Kingdom (UK) concerning trade marks (Arts. 30 (3) and 31 (1) of the [Trade Marks Act of UK 1994](#)), but in other countries it is established by the court practice of interpreting vague statutory provisions concerning trade marks, as in Latvia ([Decision of the Civil Case Panel for the Supreme Court of the Republic of Latvia, 2010](#); [Act 'On Trade Marks and Indications of Geographical Origin' of the Republic of Latvia, 1999](#)).

The reason why a licentiate raises a claim in its own name can be easily seen: it not only involves positive results such as collecting damages, but also negative risks such as covering the litigation expenses of the opposite party in case of an unsuccessful outcome. In addition, if provisional measures are applied, and later the claimant loses the case, the damages caused by the defendant by the application of the provisional measures shall be compensated for exclusively by the claimant (to be reviewed further, both in respect of the Enforcement Directive and the national laws of the EU Member states).

Second, it is evidence that the Enforcement Directive provides that 'the applicant's right is being infringed, or that such infringement is imminent'. However, it should be noted that this wording is not precise for the same reasons as the first type of evidence concerning ownership status.

Therefore, one may object against the application of the provisional measures if the claimant (in on-going court proceedings), or the possible claimant (in cases where the provisional measures are requested before bringing a claim to the court), does not furnish the evidence that it is entitled to raise in a particular IP infringement claim. This not only includes evidence of ownership of a particular IP right, but also other requirements, for instance, evidence that such an IP right is still in force. In the case of registered objects (such as trade marks, patents, designs and others), it is evidence that the registration has been renewed, and in the case of trade marks, that they have been genuinely put to use, and in the case of certain IP objects (copyright, related rights, sui generis data base rights and some others), that the limitation period for their protection has not expired.

2.2.2. Right to be heard

Another requirement relates to the issue when provisional measures are taken without the defendant having been informed about them, when any delay would cause irreparable harm to the right holder. In this case, the parties shall be

⁹ For discussion of provisional measures in the Enforcement Directives in detail, see generally (Walter and Goebel (2010); Bonadio, 2008).

¹⁰ That is, provisional measures on the discontinuation of the imminent IP infringement (Art. 9 (1) (a) of the Enforcement Directive), seizure or delivery up of the allegedly infringing goods (Art. 9 (1) (b) of the Enforcement Directive), and seizure of the movable and immovable property of the alleged infringer (Art. 9 (2) of the Enforcement Directive).

informed about this without delay after the execution of the measures. But in these situations, a review, including a right to be heard, shall take place upon the request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether those measures shall be modified, revoked or confirmed (Art. 9 (4) of the Enforcement Directive). This provides another defence for an alleged infringer to challenge the already applied provisional measures by requesting they be revoked.

2.2.3. *Time period for lodging a claim*

The third requirement relates to the issue of respective proceedings instituted by a possible claimant which shall be, within a reasonable period, determined by the respective national court where the law of a Member State so permits, or in the absence of such a determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.

If such a claim is not brought to court, the available defence for an alleged infringer would lie in requesting the revocation of the applied provisional measures due to the claimant's failure to bring a claim. As the requirements for the time period for bringing a claim to the court are mandatory (either determined by the law of a EU Member state or established by a court), the bringing of a claim after that time period would constitute a defence for an alleged infringer, allowing them to request the revocation of the applied provisional measures due to the breach of that time period for bringing a claim.

2.2.4. *Monetary based defences*

There are two options provided by the Enforcement Directive for an alleged infringer to protect its interests, which could also be considered as its defences.

First, it is the right to request that an alternate measure (or to be ordered by the court at its discretion) be provided by the claimant as an 'adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant' (Art. 9 (6) of the Enforcement Directive). This would be appropriate in cases when the alleged infringement is not obvious, i.e., no *prima facie* evidence of the existence of a particular IP infringement exists, or arbitrary. Although such a security may be ordered by a court irrespective of whether the claimant, a holder of rights relating to a particular IP object, agrees with such a measure, its agreement would mean that the court would usually follow through in regard to such an uncontested application of security by establishing its amount.

Second, as an alternative to the envisaged provisional measures, an alleged infringer may request a recurring penalty payment on the condition that such a penalty is provided for by national law or the lodging of guarantees intended to ensure the compensation of the right holder (Art. 9 (1) (a) of the Enforcement Directive).

As a separate remedy for the protection of the interests of an alleged infringer as a defence against the unjust application of provisional measures, there is a right to claim damages from the claimant in cases where the initiated proceedings were unsuccessful for the claimant, irrespective of the reason (except surely, a case of settlement) or when those proceedings were not initiated within the prescribed period of time, but before the provisional measures were adopted and executed (Art. 9 (7) of the Enforcement Directive).

2.3. *Nature of the transposition of provisions governing provisional measures*

As it can be summarised, there are certain defences available for alleged infringers against the application of provisional measures, or if applied, on their revocation.

However, Art. 9 of the Enforcement Directive allows broad discretion of the EU Member states in providing particular defences and, therefore, their availability for alleged infringers depends on their transposition in the national laws of the EU Member states. In addition, the basis for the provisional measures is the existence of 'an imminent infringement of an intellectual property right' as *expressis verbis* stated by Art. 9 (1) of the Enforcement Directive (and also contained in Art. 9 (3) of the Directive). However, its meaning or any definition thereof is not provided, and is completely left for the EU Member states. The same could be said about the concepts of 'an intellectual property right', 'a commercial scale', 'security' and others. Therefore, in view of this broad discretion, the lack of any definitions for particular provisional measures and the clear obligations imposed on the EU Member states for their transposition, it may be fully agreed that '[t]he Enforcement Directive is obscure in regard to its mandatory nature' (Von Muhlendahl, 2007, p. 380). Therefore, depending on the wording of the relevant provisions, the EU Member states may decide whether to transpose the relevant defence and to what extent when it is provided as a mere option.

As regards mandatory provisions in respect to the regulation of provisional measures included in Art. 9 of the Enforcement Directive, it shall be noted that incompliance between the Enforcement Directive and the national laws of the EU Member states may arise from two different sources. First, the incompliance could be due to incompletely transposed provisions of the Enforcement Directive, which could be relatively simply established by comparing the relevant text of the Enforcement Directive and the relevant texts of the national laws of the EU Member states. Second, it could result from court practice in the EU Member states in applying these relevant national laws inappropriately either through erroneous interpretation of the relevant provisions of the Enforcement Directive or even an *expressis verbis* ruling against these provisions guided by the national traditions of a particular EU Member state. As far as allowed by the available literature, this article will review both these potential sources of the practical application of provisional measures in the EU Member states. In this way, the practical implications of the Enforcement Directive would be put to the test, especially considering

the rather critical opinions expressed by the academic commentators concerning the success of regulation included in Art. 9 of the Enforcement Directive ([Kur, 2004, p. 825](#); [Cornish et al., 2003](#)).

Shortly after the entry into force of the Enforcement Directive, there were full grounds to state that '[t]he effects of [Enforcement] Directive [...] are not yet known. Implementation of the directive is not yet concluded in all Member States so that experience is lacking as to whether the harmonisation of civil law will prove insufficient' ([Hilty, Kur and Peukert, 2003, p. 972](#)). From the point of view of the current development of the national law of the EU Member states, such a review can be done by focusing on the provisional measures in this article.

Consequently, further review of the defences available for alleged infringers in the EU Member States will be carried out within the application or revocation of the provisional measures.

3. Review of National Law and Practices in the EU Member States

3.1. Approaches for transposition

Due to the scope of this article, at first there is a necessity to provide an overview on approaches for the transposition of relevant provisions of the Enforcement Directive governing provisional measures, namely, those included in Art. 9 of the Enforcement Directive.

3.1.1. Case law approach

First, it is the United Kingdom's (hereinafter the UK) approach, where the transposition of those provisions took place by adoption of the Intellectual Property (Enforcement, etc.) Regulations 2006¹¹ which had come into force on 29th April 2006 (Art. 2 of the Intellectual Property (Enforcement, etc.) Regulations 2006). Yet, Art. 9 of the Enforcement Directive was not covered by the [Intellectual Property \(Enforcement, etc.\) Regulations 2006](#), as the application of provisional measures has been dealt with according to the case law of the English courts based on *American Cyanamid v Ethicon* (1975)¹² as the leading precedent. Still, statutory authority exists for the competence of the English courts to grant provisional measures ([AIPPI, 2012](#)) as provided by Art. 37 of the Senior Courts Act 1981 (in respect to senior courts as defined by that act) and the Civil Procedure Rules providing regulation concerning interim injunctions ([Practice Direction 25A of the Civil Procedure Rules of UK](#)). Consequently, as summarised by the English court's approach by Honour Judge Birss QC in its recent judgment, '[a]pplications for interim injunctions are considered on *American Cyanamid* principles. The claimant must have an arguable case and if so, then one moves to consider the balance of convenience or balance of justice ([Merck Sharp Dohme Corp & Anor v Teva Pharma BV & Anor, 2012](#)).

Similarly, the transposition of the provisions of Art. 9 of the Enforcement Directive took place in Ireland. Ireland has only provided the competence of the Irish courts to apply injunctions¹³, but their application criteria is solely for the case law of Irish courts ([AIPPI, 2012, p. 577–578](#)).

3.1.2. Sui generis approach

Another approach was undertaken by Latvia through the transposition of Art. 9 of the Enforcement Directive into a specially designated chapter of a law governing civil procedure not only covering provisional measures, but also other civil procedural remedies ([Civil Procedure Act of the Republic of Latvia, 1998](#)).

3.1.3. Security of claim approach

A different approach was undertaken by a group of countries continuing to grant provisional measures on the basis of security of claim when 'there is reason to believe that failure to secure the action may render compliance with the judgment difficult or impossible' as it is in Estonia (Art. 377 (1) of the [Code of Civil Procedure of Republic of Estonia \(2005\)](#)), Lithuania (Arts. 144–152 of the [Code of Civil Procedure of Republic of Lithuania \(2002\)](#)), the Czech Republic (Art. 74 of the [Code of Civil Procedure of Czech Republic \(1963\)](#)), Slovakia (Art. 74 of the [Code of Civil Procedure of Republic of Slovakia \(1963\)](#)), and Bulgaria (Art. 391 (1) [Civil Procedure Code of the Republic of Bulgaria \(2007\)](#)). As to the granting of provisional measures through security of claim, it is pointed out that, '[i]t in no way excludes the use of securing of claims as a 'precautionary measure' (Article 9, Paragraph 2 of the Directive) 'if the injured party demonstrates circumstances likely to endanger the recovery of damages' ([Patent Office of the Republic of Latvia, 2006](#)). However, such an opinion is disputable, as the aim of

¹¹ For a brief overview of the transposition of the Enforcement Directive into English law, see, for instance, ([Bently and Sherman, 2008, p. 1069–1070](#); [Bainbridge, 2012, p. 920–921](#)).

¹² For discussion of the *American Cyanamid v Ethicon* case and its consequences, see ([Cornish, 1999, p. 69–71](#); [Bainbridge, 2012, p. 927–929](#); [AIPPI, 2012](#)).

¹³ Art. 18 (2) of the [Trade Marks Act of Ireland 1996](#) provides that in an action for infringement of a registered trademark, all such relief by way of damages, injunctions, accounts or otherwise shall be available to the proprietor as is available in respect of the infringement of any other property right; a similar provision was also inserted in Art. 57 (3) of the [Industrial Designs Act of Ireland, 2001](#) and in Art. 127 (2) of the [Copyright and Related Rights Act of Ireland, 2000](#); slightly different, but with a similar scope provided in respect of patents: 'in [civil] proceedings a claim may be made for an injunction restraining the defendant from any apprehended act of such infringement' (Art. 47 (1) (a) of the [Patents Act of Ireland 1992](#)).

security of claim and provisional measures, as provided by Art. 9 of the Enforcement Directive, is different: if in the first case, the rationale is based on the impossibility of enforcement of a court's ruling, then in the second case – to the imminent infringement of an IP right, irrespective of any impact on enforcement of the court's ruling.

Still, the application of the procedure for security of claims in respect of provisional measures is subject to the specifics of the IP infringements in requesting them to comply with the evidence threshold as discussed briefly above or the possibility to apply provisional measures without a hearing of parties. For instance, as provided by Art. 378 (2) of the Code of Civil Procedure of Republic of Estonia, in order to secure an action based on infringement of copyright or related rights, or industrial property rights, the court may, among other actions, seize the goods, over which there is doubt of infringement of intellectual property rights, or impose an obligation to hand over such goods to prevent them from being offered on the market or the distribution of such goods. It should be mentioned that adjustment of the procedure of security of claim to align with the application of provisional measures does not fully comply with the regulation of provisional measures as provided by Art. 9 of the Enforcement Directive, i.e., when the infringement is imminent, irrespective of whether there would or would not be any difficulties in executing a court's ruling. However, the European Commission has not brought any Member state to the Court of Justice of the European Union for the possible failure of the transposition of that provision.

3.1.4. Urgency approach

A more specific approach is undertaken in Germany, where any provisional measures as preliminary injunctions will be adopted in specific urgent cases (AIPPI, 2012, p. 551). In case of an unfavourable first instance court judgment, it may be provisionally declared to be enforceable against security only in accordance with the German Code of Civil Procedure (2005) except in certain exceptions (Arts. 708, 710–712), thus ensuring the balance of parties.

By switching over from the overview of different approaches in the transposition of Art. 9 of the Enforcement Directive to particular practical implications, it would be appropriate now to review the availability of defences provided by Art. 9 of the Enforcement Directive discussed in Section 2.2. of this article.

3.2. Main defences under national law

3.2.1. Evidence threshold

The EU Member states do not provide any specific statutory regulation or definition on the evidence threshold, except a few Member states. For instance, in Lithuania it is provided that '[t]he court shall have the right to require the person who applies for provisional measures to provide any reasonably available evidence in order to satisfy the court with a sufficient degree of certainty that the said person or the person in whose interest provisional measures are applied for is the holder or user of the rights established by this Law and that the applicant's right is being infringed, or that such infringement is imminent' (Art. 47.3 (4) of the Act 'On Designs' of the Republic of Lithuania (2002)).

At the same time, such definition of the evidence threshold is mainly undertaken in the court practice. So, in the case of Latvia, though the Latvian Civil Procedure Law does not envisage different regulation other than that provided by Art. 9 (1) of the Enforcement Directive, it shall be noted that there is a certain development in the Latvian court practice. According to Latvian court practice, if there is a dispute over ownership of a particular IP right for whose protection preliminary measures are sought, then such measures in such circumstances cannot be applied (Petersons, 2010, p. 142–150). A similar situation applies in the case of arbitrary cases when the IP infringement is not obvious during the procedure on evaluating the application of provisional measures.

In addition, an evidence threshold may also be imposed concerning the evidence on making a deposit payment for reviewing of the application on imposing provisional measures (see Section 3.2.4.1. of this article). Therefore, if evidence is not submitted testifying that a deposit or security has been provided if it is imposed by the respective national law (or court as discussed further), there are no grounds to apply provisional measures, but if applied, an alleged infringer may request to revoke such measures due to failure to submit evidence on the provided deposit or security.

As a result, there are considerable differences among the EU Member States in relation to evidence threshold within the application of provisional measures. The existence of such differences was affirmed by the European Commission itself by pointing out that 'the level of evidence required by the courts to grant an injunction differs significantly between the Member States and, in general, is rather high' except some IP infringements' (European Commission, 2010)

3.2.2. Right to be heard

All EU Member states provide for the possibility to decide an issue concerned with the application of provisional measures in urgent cases without a hearing of the parties based on an application with attached evidence filed by a claimant. However, certain differences are provided for the execution of that possibility among the EU Member states. So, in Lithuania, almost verbatim wording was transposed¹⁴ as provided by Art. 9 (4) of the Enforcement Directive. However, in Estonia, in accordance with the Code of Civil Procedure of Republic of Estonia (2005) it is at the discretion of the court to invite a defendant for reviewing an application for security for claim (Art. 384), but defendants have the right to appeal against a court's ruling by which an application for securing an action is satisfied (Art. 390 (1)).

¹⁴ It is transposed by Lithuanian sui generis IP laws, for instance, in case of designs – by Art. 47.3 (6) of the Act 'On Designs' of the Republic of Lithuania.

3.2.3. Time period for lodging a claim

The majority of the EU Member states allow the lodging of a request for a preliminary provision before bringing a claim, however, in practice, such a request is not usually granted. So for instance, in Estonia, such a request is governed by Art. 382 of the Code of Civil Procedure of Republic of Estonia, which is ‘generally not accepted by the court’; therefore, such a request must be submitted together with the claim itself (AIPPI, 2012, p. 512).

3.2.4. Monetary based defences

3.2.4.1. *Security provided by plaintiffs (right holders).* There are vast differences between the EU Member states in respect of the regulation of securities necessary for granting provisional measures.

On the one hand, there are Member states where it is provided that the security or deposit money provided by claimants is compulsory for reviewing the efficacy of the application of provisional measures. So, it is provided in the Czech Republic that a deposit equivalent to EUR 2000 shall be paid for covering the possible damages of a defendant in filing a statement for the application of provisional measures (the [Code of Civil Procedure of Czech Republic, 1963](#)). Similarly, in Sweden and Finland (the [Code of Judicial Procedure of Republic of Finland, 1743](#)), a security must be presented, except when the claimant is found to be unable to do so, or his or her right is deemed to be manifestly well-founded (Art. 7 of Chapter 7). Such a situation also exists in other EU Member states such as in Germany as stated above. In Estonia, Art. 383 of the Code of Civil Procedure of Republic of Estonia provides for a security to be paid by the plaintiff in order to compensate for possible damage caused to the opposing party, i.e., the alleged Civil Procedure Code of the Republic of Bulgaria infringer; and a similar provision is provided in Lithuania (Art. 147 (1) (2) of [Code of Civil Procedure of Republic of Lithuania \(2002\)](#)).

On the other hand, there are some EU Member states whose statutes do not provide for any compulsory duty for claimants to submit a security, leaving it for the courts to decide whether any security must be presented by claimants.

So, for instance, in Bulgaria, it is provided that the court may obligate the plaintiff to furnish a bond of money or property in an amount determined by the court on the basis of the amount of the direct and immediate damages which the respondent will incur if the injunction is unfounded (Art. 391 (2) and (3) of the [Civil Procedure Code of the Republic of Bulgaria \(2007\)](#)). Similarly, in Hungary, it is provided that the court may subject the ordering of provisional measures to the requirement of lodging of security (Art. 104 (13) of the [Patent Act of the Republic of Hungary \(1995\)](#)), which is usually required by the court ([Hungarian Patent Office](#)) and in an amount equivalent to EUR 3600 up to EUR 10,800.

There are also some EU Member states which have provided further limitations for alleged infringers to request any security to be provided by claimants. So, in Latvia, the [Civil Procedure Act of the Republic of Latvia \(1998\)](#) only provides for security in cases where a provisional measure is applied before the claim is brought to the court (Art. 250. 12 (3)). In this situation, it could be suggested that Art. 9 (6) of the Enforcement Directive may be appropriately transposed into the Latvian national laws, as the above Directive’s provision does not provide for the compulsory imposition of security from claimants. Still, it would be possible to interpret the relevant national measure in the light of the entire wording of Art. 9 of the Enforcement Directive, and also require the application of such security in cases when the provisional measures are applied after or together with claim when the claim is brought to the court. Still, as far as the author of this article knows, there has never been a Latvian court ruling which could shed any light on this issue.

3.2.4.2. *Security as alternative measures provided by defendants (alleged infringers).* There are few EU Member states which provide for the payment of security as an alternative measure for the application of certain prohibitions in respect of alleged infringers.

So, in Estonia, the alternative of supplementing provisional measures with a secured money payment is only applicable if the court imposes custody, detention or prohibition from departing from his or her residence on a person by a ruling on securing an action involving a monetary claim or a ruling on securing an action (Art. 385 of the [Code of Civil Procedure of Republic of Estonia, \(2005\)](#) or with the consent of the plaintiff, or for a good reason (Art. 386 (2) of the [Code of Civil Procedure of Republic of Estonia \(2005\)](#)).

On the other hand, in Hungary, the Patent Act of the Republic of Hungary (2005) allows the request of a security in patent infringements, instead of requesting the discontinuation of the infringement (Art. 104 (5) (c)). It is interesting that in Hungary, the court may refuse the application of provisional measures, but still may order the lodging of a security (Art. 104 (6) of the [Code of Civil Procedure of Republic of Hungary \(1952\)](#)). In contrast, such an alternative is available in Lithuania (Art. 146 (2) of the [Code of Civil Procedure of Republic of Lithuania \(2002\)](#)) and in Germany in order to cancel the preliminary injunction (Art. 927 of the [Code of Civil Procedure of the Federation of Germany \(2005\)](#)).

Penalties for the breach of provisional measures are rare, though some EU Member states provide such measures, for instance, in Lithuania, where it is also envisaged that a plaintiff may also request damages (Art. 149 of the [Code of Civil Procedure of Republic of Lithuania \(2002\)](#)).

3.2.4.3. *Compensation of damages.* There is a general obligation for the claimant to compensate for damages in cases where there is an unfavourable outcome for the claimant, when provisional measures were previously applied by the court¹⁵. Such

¹⁵ For instance, Art. 391 (1) of the [Code of Civil Procedure of Republic of Estonia \(2005\)](#); Art.77 (3) of the [Code of Civil Procedure of Republic of Slovakia \(1963\)](#) and Art.77 (3) of the [Code of Civil Procedure of Czech Republic \(1963\)](#); Art. 147 (3) of the Lithuanian Code of Civil Procedure (2002); Art. 47.3 (7) of

an obligation shall only be borne by the claimant, and the reason for such a position is perfectly explained in the legal literature: it is 'recognition that the defendant is not able to fully defend itself in interim procedures (that are sometimes even decided *ex parte*, i.e. without hearing the other side), and that, due to the limited scope of discovery, the risk of a mistaken decision should be borne by the applicant alone' (Heath, 2008, p. 322).

Still, there are some requirements to be observed for defendants in order to be compensated for damages incurred due to the application of provisional measures which latter appeared to be unfounded due to the imposition of limitation periods. These are specific limitation periods in addition to those provided by the obligations under law (contract law). Thus, in Estonia, the imposed limitation period is 2 months to file an action for compensation if a security for the compensation for damage was imposed on the plaintiff (Art. 391 (2) of the [Code of Civil Procedure of Republic of Estonia \(2005\)](#)); 6 months in cases of the Czech Republic (Art. 77a (2) of the [Code of Civil Procedure of Czech Republic \(1963\)](#)); or one year in the cases of Finland (Section 12 (2) of Chapter 7 of the Code of Judicial Procedure of Republic of Finland (1743)). In Bulgaria, although there is no time limit provided for the submission of such an application, the defendant is still required to submit a petition to the claimant afterwards and within one week, lodge an opposition to the release of the bond and, within one month, bring an action for the damages inflicted thereon (Art. 403 (2) of the [Civil Procedure Code of the Republic of Bulgaria \(2007\)](#)).

4. Conclusion

Considerable disparities exist among the EU Member states on the regulation of the application of provisional measures which, as justly observed, are detrimental to the objective of harmonisation pursued by the European Commission within the Enforcement Directive (Geiger, Raynard and Roda, 2011, p. 549). In addition, differences between the texts of the laws of different EU Member states on the transposition of the Enforcement Directive have already been noted in the legal literature (Geiger et al., 2011, p. 546). These differences in respect of provisional measures not only cover the very availability of the provisional measures and their scope, but also the available legislative approaches which are still based on national traditions in most EU Member states. Such national traditions are particularly reflected in approaches towards the transposition of Art. 9 of the Enforcement Directive on provisional measures as discussed at the beginning of Section 3 of this article.

Another source of disparities relates to the legislative approaches employed for the transposition of that provision. There are some EU Member states which have taken a formal approach by transposing the minimum provisions like Lithuania; there are Member states which have transposed the relevant norms, possibly inappropriately, like Latvia; there are Member states such as Hungary, which provides three different possibilities to apply the provisional measures, like imminent infringement, by maintaining the status quo, or in cases of the necessity of equitable protection (Art. 156 (1) of the [Code of Civil Procedure of Republic of Hungary \(1952\)](#)); there are also Member states like Sweden¹⁶ or Finland (Section 3 of Chapter 7 of the [Code of Judicial Procedure of Republic of Finland \(1743\)](#)) that provide statutory regulation for the application of provisional measures in cases of imminent or actual infringement diminishing the value of a particular IP object; there are some Member states who did not even fully provide statutory regulation for the application of provisional measures like the UK, Ireland, or Germany; and there are also Member states who continue to apply rules based on security of claim¹⁷ such as Estonia, the Czech Republic, Slovakia and Bulgaria, as stated above.

Finally, in regard to the discretionary nature of the granting of provisional measures, the practices among the EU Member states are also different: in the cases of Ireland, the application of provisional measures is purely discretionary (AIPPI, 2012, p. 581) as well as in the majority of other EU Member states. In Austria it depends on the fulfilment of statutory conditions only (AIPPI, 2012, p. 461). Consequently, such legal practice has a considerable impact on the defences available to alleged infringers from one EU Member State to another.

Therefore, any efforts to provide a common approach for the application of provisional measures for IP infringements within the EU have not been fruitful so far. Although the Enforcement Directive was adopted to 'facilitate the enforcement of IP rights before civil courts, thereby pushing considerably beyond the levels of enforcement set by TRIPS as well as the enforcement levels previously established by the various national laws' (Grosse Ruse-Khan and Jaeger, 2009, p. 503–504), the aim has only been partially reached. At the same time, the European Commission itself evaluated the application of the regulation on provision measures as 'positive' (European Commission, 2010). Besides, as can be seen from the study, the Enforcement Directive was not capable of overcoming the different national traditions of civil procedure in the EU Member states in the application of provisional measures. In this regard, it is disputable whether the provisional measures provided by Art. 9 of the Enforcement Directive 'do not have their roots in legal deficiencies,

(footnote continued)

the Act 'On Designs' of the Republic of Lithuania (2002); 403 (1) of the [Civil Procedure Code of the Republic of Bulgaria \(2007\)](#); Arts. 11 and 12 (1) of Chapter 7 of the Finnish Code of Judicial Procedure (1734).

¹⁶ Such regulation is provided by sui generis Swedish intellectual property laws, for instance, by Art. 3 (1) of the Chapter 8 of the [Trade Mark Act of Swedish Kingdom \(2010\)](#).

¹⁷ In contrast, in Latvia, one alternative is to request provisional measures through security of claim instead of applying sui generis regulation on provisional measures applicable in IP infringement cases.

but rather in factors such as the willingness of courts to grant preliminary injunctions in cases typically involving complex assessments' (Kur, 2004, p. 825–826).

The existing differences between the EU Member States, however, cannot be overcome simply by introducing amendments to the Enforcement Directive, as admitted by the European Commission (2010b)¹⁸, academic commentators¹⁹ and stakeholders (European Commission, 2012)²⁰, but there should be changes in the form of regulation of the provisional measures (and also other civil law measures in respect of IP infringements).

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¹⁸ By stating that '[t]he analysis shows that certain provisions of the Directive including the relationship with other Directives are understood in different ways in the different Member States and have given rise to different interpretations and application in practice. These provisions could warrant further clarifications to make the Directive fully effective; and the use of provisional and precautionary measures 'could deserve further attention'.

¹⁹ As stated by Professor Robin Jacob (European Commission, 2012b), the system of enforcement still differs markedly from one Member State to another, and a certain number of refinements are possible.

²⁰ By identifying the necessity for adjustments in the Enforcement Directive regarding rules for the lodging of securities in different Member States.

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